80-426

No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

ALVINA E. SCHWARZ,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

GEOFFREY P. KNUDSEN
Suite 420, Russ Building
235 Montgomery Street
San Francisco, CA 94104
(415) 788-0656
Attorney for Petitioner

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

QUESTIONS PRESENTED FOR REVIEW

1. When the United States is a defendant in a tort action and the plaintiff is required to sue in federal court should the function of appellate review of the district court's legal conclusions be abdicated by limiting any review to a "clearly wrong" standard?

2. Do the California Supreme Court cases impose a duty upon a psychiatrist who treats a person as an outpatient and who diagnoses that person as a possible suicide risk to exercise reasonable care to protect the patient from that danger?

3. Is the discharge of that duty by a psychiatrist to be measured by a special professional standard of conduct limited to only psychiatrists or by a "reasonable man" standard?

4. Is the discharge of that duty by a Veterans Administration psychiatrist a discretionary act within the meaning of 28 U.S.C. § 2680(a)?

5. Does 38 U.S.C. § 3301 insulate a Veterans Administration psychiatrist from discharging that duty?

6. If the duty is not discharged by the psychiatrist can the failure to discharge the duty be sufficiently causally linked to the patient's suicide?

PARTIES TO THIS PETITION

The petitioner herein is Alvina E. Schwarz, plaintiff in a wrongful death action in the courts below. The respondent is the United States of America, defendant in the courts below.

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ALVINA E. SCHWARZ,
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VS.

UNITED STATES OF AMERICA,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner and plaintiff, Alvina E. Schwarz, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on June 17, 1980.

I

OPINIONS BELOW

The memorandum opinion of the Court of Appeals (Appendix A) was not published. The Judgment of the Court of Appeals appears in Appendix B. The District Court rendered an oral decision (the text of which is in Appendix E) and later entered the Findings Of Fact And Conclusions Of Law and Judgment submitted for entry by the United States of America (Findings And Conclusions Of Law,

Appendix C; Judgment, Appendix D). To petitioner's knowledge the Findings Of Fact And Conclusions Of Law have not been published.

II

RELEVANT STATUTES

The statutes relevant to the questions presented for review are 28 U.S.C. § 1346(b), 28 U.S.C. § 2680(a), and 38 U.S.C. § 3301(a) and (b), the verbatim text of which is set forth in Appendix F.

III

STATEMENT OF THE CASE

A. Proceedings In The District Court

This action was brought by the petitioner, Mrs. Alvina Schwarz, to recover damages resulting from the wrongful death of her son, Raymond J. Schwarz. The action was brought against the United States of America for the negligence of the Veterans Administration, and its employees, servants, and agents in failing to take certain steps to prevent Raymond Schwarz from committing suicide.

After having complied with the administrative tort claim procedure, petitioner brought this action in a federal court as required by the Federal Tort Claims Act, 28 U.S.C. § 1346(b).

The matter was tried to the court without a jury and the evidence was limited to the liability issue only. After the close of the petitioner's evidence, the district court entertained a motion under Fed.R.Civ.P. 41(b) and dismissed the case on the ground that upon the facts and the law the plaintiff had shown no right to relief.

The facts developed at the trial are summarized as follows:

1. On or about April 24, 1972, Raymond J. Schwarz committed suicide by ingesting a lethal amount of cyanide. At the time of his suicide Raymond Schwarz was an outpatient of the Veterans Administration Fort Miley Mental Health Clinic, under the care and treatment of Dr. Bruce Johnston.

2. On February 7, 1972, approximately two and one-half months prior to the suicide of Raymond Schwarz, Dr. Johnston had concluded that "the long range prospect [of suicide] is guarded" and that there was a real possibility of suicide.

3. This February 7th conclusion was reached at a psychiatric interview which was precipitated by an earlier contact that day between Raymond Schwarz and Dr. Raffin of the Veterans Administration, who was initially so concerned over Raymond's mental health that he had made all the necessary arrangements to have him hospitalized on an emergency basis at the major Bay Area psychiatric facility of the Veterans Administration. During the course of the psychiatric interview with Dr. Johnston, Raymond discussed the fact that suicide was one of his "rights".

4. On April 11, 1972, just 13 days prior to Raymond Schwarz's suicide, he discussed suicidal thoughts with his mother. Mrs. Schwarz's response to this discussion was to convince her son to immediately go to the Veterans Administration Hospital for assistance.

5. Raymond Schwarz requested admission to the hospital but was advised to return later in the morning to meet with Dr. Johnston. Accompanied by Mrs. Schwarz, Raymond Schwarz returned to the hospital

later in the morning of April 12, 1972, for his appointment with Dr. Johnston.

6. During the course of the April 12, 1972, appointment, Dr. Johnston prescribed the drug Stelazine for the purpose of producing a calming effect. Dr. Johnston did not, however, take any steps to insure that Raymond Schwarz would continue to take the Stelazine as prescribed even though withdrawal of the drug would negate any calming effect. At least during the time immediately following April 12, 1972, while Raymond Schwarz remained with his mother, the drug had the desired calming effect.

7. Dr. Johnston scheduled Raymond Schwarz for a further appointment. Dr. Johnston could not, however, have been at all confident that Rayomnd Schwarz would keep the scheduled appointment, since Dr. Johnston's experience had been that Raymond Schwarz failed to keep appointments and disappeared from contact for a matter of months.

8. Immediately after Dr. Johnston met with Raymond Schwarz, Mrs. Schwarz specifically asked to talk to him. Dr. Johnston refused to discuss her son's condition with Mrs. Schwarz in response to her direct request, even though he had not changed his diagnosis of the possibility of suicide at any time since his February 7, 1972, diagnosis.

9. At no time after making his February 7, 1972, determination of the possibility of suicide did Dr. Johnston consider seeking voluntary or involuntary hospitalization of Raymond Schwarz. And, Dr. Johnston never advised Mrs. Schwarz to consider either of these courses.

The district court considered the petitioner's allegation of negligence with respect to what it considered to be two issues—(1) duty to warn, and (2) duty of due care in protecting Raymond Schwarz against his own suicidal intentions. (App. A-10, A-14, A-27) The question of the duty of due care in protecting Raymond Schwarz against his own suicidal intentions was considered by the district court to include any claims raised regarding (1) the course of treatment, (2) failure to commit Raymond Schwarz voluntarily, and (3) failure to take steps to commit Raymond Schwarz involuntarily. (App. A-14, A-27, A-28)

B. Proceedings In The Court Of Appeals

Petitioner appealed from the judgment dismissing her case on the ground that the district court's legal conclusions were erroneous. The petitioner did not challenge any of the district court's factual determinations as clearly erroneous. The petitioner raised no claims with respect to the district court's decision to dismiss any claim regarding actual treatment procedures, the failure to commit on a voluntary basis, or the failure to take steps to commit on an involuntary basis. The only issue presented on appeal in terms of the duty owed to Raymond Schwarz was, does California law impose a duty upon a psychiatrist who treats a person as an outpatient and who diagnoses that person as a possible suicide risk to exercise reasonable care to protect the patient from that danger?

The petitioner asserted that the duty existed under California law and that the discharge of that duty had to be measured by the traditional "reasonable man" standard. The petitioner contended that the district court's legal con-

clusions were wrong under California law, since that court treated the question of whether family or other responsible parties should have been advised of the Veterans Administration's prognosis for Raymond Schwarz of possible self-inflicted harm, as constituting a separate duty to warn, distinct from a duty of due care to protect Schwarz from his suicidal tendencies and governed by a professional standard of conduct.

Without setting forth any analysis or discussion of the California Supreme Court cases, the Court of Appeals affirmed the district court's judgment, stating that "the legal conclusions of the district judge, whose analysis of the law of the state in which he sits is entitled to great weight, were not clearly wrong." (App. A-2)

IV

ARGUMENT SUPPORTING ISSUANCE OF THE WRIT

A. Summary

In affirming the decision of the district court, the Court of Appeals simply stated we cannot say that "the legal conclusions of the district judge . . . are clearly wrong". (App. A-2) It did so without any discussion of the applicable California Supreme Court cases. It did so without any comment on the reasoning of the district court. In essence, it chose to shield itself from consideration of the legal issues arising out of a controversial subject—possible disclosure of suicidal intentions—and to deprive the petitioner of any real appeal. This Court should not permit the rule of law embodied in *Gee v. Tenneco, Inc.*, 615 F.2d 857 (9th Cir. 1980), cited by the Court of Appeals, to deprive

the petitioner of a standard of review which she would have had with respect to legal conclusions, merely because she was compelled by federal law to bring her claim against the United States in a federal court. As the record demonstrates in the instant case, the application of such a rule of law led not only to a deprivation of the legal analysis to which the petitioner would have been entitled in the state appellate courts, but also to the affirmance of conclusions of law which in fact violate the standard of "plain error" or "unreasonable." The district court concluded that in the absence of a "specifically articulated intention of decedent to kill himself" (App. A-11, A-26), there was no duty on the Veterans Administration to advise Mrs. Schwarz or anyone of the possibility of suicide by Raymond Schwarz. The district court also found, however, that the evidence established a "long-range danger". (App. A-26) Under California law, it is the mere determination that a "danger" exists which gives rise to a duty to exercise reasonable care to protect against the foreseen danger. Although in making his diagnosis of the risk of danger, a psychiatrist must exercise only that degree of care ordinarily possessed by members of his profession under similar circumstances, if in the exercise of that care he concludes the danger exists, he is then bound to respond to the determined danger under the traditional negligence standard of reasonable conduct.

B. The Court Of Appeals Abdicated Its Duty Of Appellate Review And Committed Reversible Error By Its Deferral To The District Court's Conclusions Of Law

The Federal Tort Claims Act, 28 U.S.C. 1346(b), compelled plaintiff to bring her action in the federal court, yet required the court to look to state law to determine whether a claim for relief existed. If the state law was uncertain, the federal court's duty was to determine how the California Supreme Court would decide the legal issue, making reference to case holdings, considered dicta and any other sources which that court would have considered had it been confronted with the opportunity to decide the issue. *See, Hawks v. Hamill,* 288 U.S. 52, 57-60 (1932).

The function of an appellate court in the State of California is to review errors of law and not to pass on determinations of fact. *Tupman v. Haberkern,* 208 Cal. 256, 262, 280 P. 970 (1929). Where the facts are not in dispute, the function of the California appellate courts is to make an "independent determination" of the law. *Gonzales v. Municipal Court,* 67 Cal.App.3d 111, 120, 136 Cal.Rptr. 425 (1977). Yet, in affirming the district court's decision in the present case, the Court of Appeals failed to execute a similar appellate review duty—to wit, it justified its affirmance merely by intoning the principle that, on occasion permits great weight to be given to the district judge's legal conclusions. While the petitioner realizes that the principle relied upon by the Court of Appeals has been questioned in previous petitions presented to this Court, *e.g., Chrysler Corp. v. Vaughn,* 442 F.2d 619 (10th Cir. 1971) *cert. denied* 404 U.S. 857 ( )), the petitioner respectfully submits that its application in cases where a

plaintiff is restricted to the federal court forum denies such plaintiff the benefit of perhaps the most important function of appellate courts, i.e., interpretation of the law.

Admittedly, this Court has an interest in refraining from making state law, but it is respectfully submitted that this interest should not prevent petitioner from receiving the guidance of an appellate court on the interpretation of law where the federal law prevents the petitioner from any access to the state's highest court.

C. The District Court's Conclusions Of Law Were Plain Error In Light Of The California Supreme Court Decisions

In cases where the federal court has had to interpret and apply local law, this Court has imposed a duty of appellate review which prohibits the Court of Appeals from deferring to the district court's legal conclusions, if independent review indicates that the lower court's determination as to local law is in plain error or unreasonable. *Francis v. Southern Pacific Co.*, 333 U.S. 445, 447-448 (1948).

Furthermore, where the arguments or state decisions presented to this Court manifest that plain error has been committed by the Court of Appeals, whether due to its deference to an erroneous district court legal conclusion or to its own independently formulated but equally erroneous legal conclusion, this Court has held that reversal is the proper remedy. *Helvering v. Stuart*, 317 U.S. 154, 163 (1942); *Francis*, 333 U.S. at 447-448.

Petitioner respectfully submits that the Court of Appeals totally ignored this Court's limitation on the principle of deference by failing to independently review the bases of state law and by deferring to the district judge's plainly erroneous view of the state law.

1. The District Court Did Not Follow California Supreme Court Decisions In Making Its Legal Conclusions

a. California Law Requires A Psychiatrist To Prevent Foreseeable Self-Inflicted Harm

Although the district court purported to analyze the California law as is set forth in *Tarasoff v. Regents of University of California,* 17 Cal.3d 425, 551 P.2d 334, 131 Cal.Rptr.14 (1976), its discussion of that case demonstrates not only the district court's essential misunderstanding of the California law, but also the Court of Appeals' plain error in affirming the district judge's erroneous legal conclusions which followed therefrom. The district court erred when it (1) concluded that California law did not already extend to the instant case of a phychiatrist's legal duty to protect a suicidal patient from foreseeable harm to himself, and (2) failed to recognize that a traditional reasonable man standard, rather than a professional standard, governs the discharge of the legal duty to protect a patient from professionally diagnosed suicidal tendencies.

The *Tarasoff* decision carves out an exception to the common law and holds that where certain special relationships exist (*i.e.*, psychiatrist-patient), a psychiatrist has a duty to act to protect another from foreseeable harm by his patient, even though that third party does not himself stand within any relationship to the psychiatrist.

In reaching its decision to impose a duty to protect third persons, the *Tarasoff* court cited with approval *Vistica v. Presbyterian Hospital*, 67 Cal.2d 465, 432 P.2d 193, 62 Cal.Rptr. 577 (1967) which held that a hospital owed a duty to protect a psychiatrist *patient*, as well as a third person from foreseeable harmful conduct of the patient. *See, Meier v. Ross General Hospital*, 69 Cal.2d 420, 445 P.2d 519, 71 Cal.Rptr. 903 (1968). In light of the clear statement of law enunciated by the California Supreme Court in the above line of cases, the district court plainly erred when it concluded that California law distinguishes a duty *to warn* of threatened harm as independent of the psychiatrist's general duty *to protect* a patient or another from foreseeable harm, and when it relied on a vacated state appellate court case,[1] rather than extant decisions of the

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[1]In its Conclusions of Law supporting the dismissal of the plaintiff's claim, the district court states as follows:

> The question of extending the *Tarasoff* decision to cover suicide cases as well has indeed been addressed by the California appellate courts, but only once. The case was *Bellah v. Greenson, supra*, and the First District Court of Appeal refused to impose liability on a psychotherapist for failure to warn a patient's parents that the patient, a child, might commit suicide. In a closely-reasoned decision, the court weighed the requirements of confidentiality regarding a patient's statements against the danger of self-inflicted harm. Its conclusion was that a therapist is required to disclose a confidential communication only when the risk is one of violent assault, and such assault is sought to be prevented by disclosure to the intended victim.
>
> The reasoning of the court in Bellah is most persuasive . . . . (App. A-11)

The decision to which the above statement refers was vacated on November 1, 1977 when a rehearing was granted. On rehearing, the court reached a far different conclusion in an opinion which was not certified for publication and which was also vacated by the

state's highest court, as the embodiment of California law on the disputed issue.

Thus, the question was whether the Veterans Administration had determined that Raymond Schwarz presented a danger to himself, not whether there was "some specifically articulated intention to kill himself." (App. A-II, A-26) Such a specifically articulated intention might never exist and yet the patient might still be known to present a danger to himself. As Dr. Johnston, who made the February 7th prognosis of the guarded long-range prospect for Raymond's suicide, testified: [f]requently someone who is seriously considering suicide may not give any verbal indication of it" and there are no "particular statements" which patients say that lead him to conclude that those patients are more serious about suicide than other patients.

The undisputed fact is that the Veterans Administration did know that Raymond Schwarz presented a danger to himself, since Dr. Johnston had determined that there

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grant of yet a further rehearing. The California Court of Appeal rendered a third and final decision in *Bellah v. Greenson*, 81 Cal. App.3d 614, 146 Cal.Rptr. 535 (1978). *Bellah* is not the California law to the extent it is in conflict with the California Supreme Court cases cited above and no significance can be attached to the Supreme Court's refusal to grant a hearing since the statute of limitation portion of the decision was definitive in terms of the plaintiff's claims.

Although the decision is inconsistent with the California Supreme Court cases with respect to the standard to be applied in measuring conduct, it does establish that a psychiatrist owes an outpatient a duty of care "to take appropriate preventive measures" when (1) a psychiatrist-patient relationship exists; and (2) the psychiatrist has knowledge that the patient is likely to attempt suicide. *Bellah*, 81 Cal.App.3d at 620.

was a real possibility of suicide. Perhaps he was not "acutely suicidal", which in Dr. Johnston's experience "most likely" warrants putting him in the hospital, but nevertheless he was a possible danger to himself. This fact alone established the existence of the duty to act reasonably to protect the patient under existing California law.

b. California Law Requires A Psychiatrist To Use Ordinary Reasonable Care To Prevent Foreseeable Harm

Finally, the district court also misconstrued California law when it failed to apply a traditional reasonable person standard to the respondent's duty to protect its patient from harm to himself. In *Meier*, the California Supreme Court made very clear a dichotomy in the law—while a professional standard governs the psychiatrist's assessment of the suicidal risk posed by his patient, once a professional diagnosis of suicidal tendencies is made, the psychiatrist's discharge of his duty to protect his patient from self-inflicted harm is governed by a *reasonable person standard.*

This dichotomy was reaffirmed in *Tarasoff*, with respect to the duty to protect third parties:

> . . . In our view, however, once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger. While the discharge of this duty of due care will necessarily vary with the facts of each case, in each instance the adequacy of the therapist's conduct must be measured against the

> traditional negligence standard of the rendition of reasonable care under the circumstances.

Tarasoff, 17 Cal.3d at 439 (footnote and citations omitted.)

It is respectfully submitted that the district court did not apply this traditional negligence standard in determining whether respondent discharged its duty and that it committed error in so doing. That the district court failed to consider the legal question of the applicable standard of care in this context is clearly evident from the record. First, the district court concluded there was no duty and hence foreclosed itself from the opportunity of fully addressing the issue of the standard of care governing that duty. (App. A-12, A-27) Second, in its findings the district court referred to a respected psychiatric opinion in the community. (App. A-12, A-27) Third, the district court specifically stated that the case involved the standard care of psychiatry. (App. A-12, A-30)

Since a traditional negligence standard should be applied in determining whether respondent discharged its duty to protect its patient from the danger he presented to himself, it is respectfully submitted that on the record and as a matter of law the Court of Appeals should have decided that respondent did not discharge that duty. Respondent simply did nothing. It did not seek involuntary commitment, nor voluntary commitment, nor the identity of family or friends. Responding to the direct inquiry of petitioner, the decedent's mother, is at the very bottom of the alternatives which presented themselves to respondent.

2. The Application Of 28 U.S.C. § 2680(a) And 38 U.S.C. § 3301 To The Facts Was A Matter Of Federal Law

Two additional reasons set forth in the district court's Conclusions of Law supporting the dismissal involve questions of federal law—28 U.S.C. § 2680(a) (App. A-34) and 38 U.S.C. § 3301 (App. A-34, A-35). Th Court of Appeals decision does not disclose whether it also accorded these legal conclusions "great weight" on the basis that state law controlled. To the extent the Court of Appeals did so, it committed error.

a. The District Court's Conclusion That Any Duty To Advise The Family In Order To Protect The Patient From The Danger He Presents To Himself Is Discretionary Under 28 U.S.C.§ 2680(a) Is Contrary To Law

The district court also based its dismissal of the petitioner's claim with respect to the failure to warn (or in the language of the *Tarasoff* decision, the "failure to protect") on its conclusion that such a warning was a "discretionary function" under 28 U.S.C. § 2680(a):

> The decision whether to give warning, in view of all the complex considerations that enter into such a decision, such as considerations of confidentiality, and the possible impact of the breach of that relationship on the ability to continue psychiatric training with that patient, seem to the court to require treating that as a discretionary function under 28 U.S.C. 2680(a). (App. A-27)

Title 28 U.S.C. § 2680(a) provides in pertinent part as follows:

> The provisions of this chapter and section 1346(a) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. (App. A-34)

In interpreting the above exception to tort liability the federal courts have consistently distinguished the "discretionary function" of formulating a particular diagnosis from the application of that diagnosis to an individual case. A decision involving a professional evaluation of a number of complex variables is not necessarily exempted from judicial scrutiny by classifying it as a "discretionary function". In specifically addressing this point the Court of Appeals for the Second Circuit noted that ordinary standards of due care can be applied to those judgments which have been classified as "discretionary". *Hendry v. United States,* 418 F.2d 774, 783 (2d Cir. 1969).

Similarly, in *White v. United States,* 317 F.2d 13, 17 (4th Cir. 1963), the Court of Appeals for the Fourth Circuit found that the policy embodied in § 2680(a) did not foreclose inquiry into the application of discretionary decisions to individual cases. See also *Merchants National Bank & Trust Of Fargo v. United States,* 272 F.Supp. 409 (D.N.D. 1967).[2]

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[2]The court refused to extend the exemption of § 2680(a) to the actions of the government psychiatrist. The court found that a duty existed to adequately inform an employer of the medical history of

b. The Provisions Of 38 U.S.C. § 3301 Do Not Affect The Liability Of The Veterans Administration

The limitation on disclosure of certain records contained in 38 U.S.C. § 3301 was not really a basis of the district court's decision[3] and could not provide the basis of the decision.

The central issue in this action is the duty of reasonable care owed by a psychiatrist to an outpatient whom he has diagnosed as a suicide risk. At trial, the United States claimed that 38 U.S.C. § 3301 constituted a bar to the existence of any such duty.[4] Though § 3301 limits public access to confidential Veterans Administration records, that section cannot in any way affect the duty of care at issue in this action.

The intent of Congress in bestowing confidential status on Veterans Administration records, was to limit, except in specific situations, the production of those records to the public. *Ross v. Cities Service Gas Co.*, 21 F.R.D. 34 (D. Mo. 1957). Indeed each of the cases relied on by respondent in the district court concerned a situation in which the production of confidential patient records was in issue.

In essence, § 3301 codifies for the Veterans Administration the privileged status of physician-patient communications which has traditionally existed under the

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a mentally ill patient and to give specific instructions regarding his work. The failure of the psychiatrist to discharge the duty to inform was sufficient to impose liability on the government.

[3]Compare App. A-27, the district court's oral decision and App. A-13, the Findings and Conclusions prepared by the United States and subsequently approved by the court.

[4]The pertinent part of § 3301 is set forth in App. A-34, A-35.

law of evidence. However, the mere existence of such a privilege does not alter the duty of care which a psychotherapist owes to a potentially dangerous patient. Similarly, Congress, when enacting § 3301, did not intend to alter the duty of care owed by physicians to their patients. Any conclusion that § 3301 extends beyond the mere protection of confidential documents clearly ignores the express intent of Congress and is erroneous.

3. The District Court Erred By Finding That There Was No Proximate Cause

The district court also found that there was not an adequate showing of proximate cause in granting its dismissal. (App. A-15, A-27) That finding was based upon the following conclusion:

> . . . inasmuch as the plaintiff herself had been told by the decedent on April 11 to 12, some twelve days before the suicide, of his thoughts about suicide, had discussed the subject with him for some time, and therefore was on notice and in a position to take whatever steps she felt appropriate to protect him. (App. A-27)

The basis for finding proximate cause and imposing tort liability giving consideration to the nature of any duty imposed is a question of law. The district court erroneously concluded that there was some distinct duty to warn applicable only to cases where there is a risk of immediate and violent harm to others. Yet, this "duty" is fully encompassed within the broader duty to protect which the California Supreme Court has stated extends to both harm to others and self-inflicted harm. *Vistica, Tarasoff*. Moreover, the discharge of this duty to protect must be

measured against traditional reasonable person standards. *Meier, Tarasoff*. Since the district court misapplied the law in terms of the existence and extent of the duty and the standard by which discharge of the duty must be measured, it could not possibly have assessed the issue of proximate cause.

The record discloses that the plaintiff took every step she might reasonably be expected to take. She physically delivered her son to the hospital twice immediately upon first hearing any talk about suicide. Moreover, she asked to speak to Dr. Johnston and was rebuked. Admittedly she knew her son was discussing suicide. But it was only the confirming determination from the patient's psychiatrist which would provide a reasonable basis for deciding whether she should do more. In fact, Mrs. Schwarz testified she would have done more.

This is precisely the difference in knowledge which the California Supreme Court cases of *Meier* and *Tarasoff* consider in the discussion of duty. If the psychiatrist has determined the danger based upon his professional expertise, he must then act in accordance with traditional negligence standards to discharge his duty to protect.

The California courts in both *Tarasoff* and *Bellah* have said that a duty exists if the psychiatrist-patient relationship exists and the psychiatrist had knowledge that the patient is likely to attempt suicide. The failure to discharge the duty cannot be excused in this case because Mrs. Schwarz was concerned enough to ask questions which fell on deaf ears and remained unanswered.

CONCLUSION

For the foregoing reasons this Court should grant a Writ of Certiorari to review the decision below.

Dated: September 15, 1980.

Respectfully submitted,
GEOFFREY P. KNUDSEN
Attorney for Petitioner

(Appendices Follow)

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 78-1406
D.C. No. C-75-0637-WWS

Alvina E. Schwarz,
Plaintiff,

vs.

United States of America,
Defendant.

MEMORANDUM

Appeal from the United States District Court
for the Northern District of California
William W. Schwarzer, presiding
Argued and submitted May 15, 1980

[Filed June 17, 1980]

Before: GOODWIN, FLETCHER and PREGERSON,
Circuit Judges

In this Federal Tort Claims action, asserting negligence on the part of a Veterans Administration psychiatrist, California tort law applies. *United States v. English,* 521 F.2d 63, 65 (9th Cir. 1975). After a trial on the issue of liability, the district court concluded that plaintiff, who claimed that a V.A. psychiatrist was negligent in not informing her of her son's suicidal tendencies, had failed to make out a claim for wrongful death under California law. The district

court's factual determinations are not clearly erroneous. Fed.R.Civ.P. 52(a). Neither can we say in a diversity case that the legal conclusions of the district judge, whose analysis of the law of the state in which he sits is entitled to great weight, are clearly wrong. *See Gee v. Tenneco, Inc.*, 615 F.2d 857 (9th Cir. 1980).

AFFIRMED.

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 78-1406
DC CV 75-0637 WWS

Alvina E. Schwartz, [sic]
Plaintiff/Appellant,

vs.

United States of America,
Defendant/Appellee.

JUDGMENT

APPEAL from the United States District Court for the Northern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered June 17, 1980.

Appendix C

In the United States District Court
For the Northern District of California

Civil No. C-75-0637-WWS

Alvina E. Schwarz,
Plaintiff,

vs.

United States of America,
Defendant.

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

[January 24, 1978]

This matter came on regularly for trial solely on the issue of tort liability and excluding damages issues on November 15 and 16, 1977 before this Court sitting without a jury. The plaintiff appeared in person and by her attorney, Geoffrey P. Knudsen, of Boone, Schatzel, Hamrick & Knudsen, Attorneys at Law; and the defendant was represented by James L. Browning, Jr., United States Attorney, by Francis B. Boone, Assistant United States Attorney, and Jack Nagan, Staff Attorney, District Counsel's office, Veterans Administration. Evidence, both oral and documentary, was offered by the respective parties and received by the Court. The Court having reviewed the file in this case, being fully advised in the premises, and having ordered judgment from the bench in favor of the

defendant, United States of A. erica, on November 16, 1977, now makes the following:

FINDINGS OF FACT

1. Plaintiff Alvina E. Schwarz, mother and heir of the decedent Raymond J. Schwarz, brought this wrongful death action under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671, et seq. Plaintiff duly filed an administrative tort claim with the Veterans Administration, which claim was denied within six months of the commencement of this action.

2. Raymond J. Schwarz enlisted in the U.S. Navy on April 8, 1969. In January 1971 he was admitted to the U.S. Naval Hospital, Roosevelt Road, Puerto Rico, with a fourteen month history of back pain complaints. On all previous medical examinations for these complaints, no physical origin of the pain could be found. During his 27-day stay in the hospital he was given a complete medical work-up, and again no physical cause of the pain complaint was identified. Mr. Schwarz' diagnosis on discharge from Roosevelt Road Naval Hospital was "back pain—mid thorax—etiology unknown."

3. From Roosevelt Road Naval Hospital Mr. Schwarz was transferred to Oak Knoll Naval Hospital in Oakland, California. Following a new series of medical examinations, no physical cause for the back pain complaints was found. Mr. Schwarz was finally diagnosed as having "psychophysiological musculoskeletal reaction, 305.1 (Manifested by lower thoracic back pain for which no organic etiology could be determined. Predisposition: an obsessive

compulsive character structure. Stress: Unknown. Impairment: complete for military duty, mild to moderate for civilian occupation.)" Based on this diagnosis, Raymond J. Schwarz was medically discharged from the U.S. Navy on June 8, 1971. The Veterans Administration granted Raymond J. Schwarz a 50 percent service-connected disability rating for this condition.

4. Raymond J. Schwarz was first seen by VA medical personnel at San Francisco VA Hospital (Fort Miley) on July 3, 1971, for complaints of back and abdominal pain. Thereafter until his last medical visit on April 20, 1972, he was seen on 23 separate occasions as an outpatient and, following an episode of rectal bleeding, was hospitalized for one seven-day period. After examination and testing, no physical cause for the bleeding complaints was found. Mr. Schwartz was given codeine and advised to seek psychotherapy at the hospital's Mental Health Clinic, which at the time he declined.

5. On a follow-up visit to the Gastroenterology Clinic at Fort Miley on November 8, 1971, Raymond J. Schwarz saw Dr. Steven B. Raffiin for the first time. Dr. Raffin was an internist specializing in gastroenterology. After an extensive work-up, Dr. Raffin could find no physiological cause for Mr. Schwarz' continuing complaints.

6. Dr. Raffin spent considerable time talking with Raymond J. Schwarz and found that his patient was depressed and also, as a result of a routine inquiry, discovered that Mr. Schwarz had given thought to the possibility of committing suicide. As a result of these findings, Dr. Raffin referred Mr. Schwarz to the Mental Health Clinic at

Fort Miley, where, on the day after the referral, November 9, 1971, Raymond J. Schwarz saw Dr. Bruce C. Johnston, a psychiatrist, for the first time.

7. Dr. Johnston's impression after that first session was that Raymond J. Schwarz was not psychotic, but recommended continuing psychiatric therapy. Raymond J. Schwarz was seen on November 11, 1971, by Dr. Johnston, whose impression following that visit was that of schizoid personality suffering from depression. Mr. Schwarz did not return to the Mental Health Clinic until sent by Dr. Raffin on February 7, 1972.

8. Raymond J. Schwarz saw Dr. Raffin on December 13, 1971, and received a prescription for a tranquilizer and smooth-muscle relaxant which the patient took in larger amounts than prescribed, but not in quantities which gave rise to concern by Dr. Raffin. On the December 13, 1971 visit, Dr. Raffin noted that Mr. Schwarz was not suicidal at that time.

9. On February 7, 1972, Raymond J. Schwarz made an unscheduled visit to Dr. Raffin at Fort Miley following an evening of aspirin abuse. He told Dr. Raffin that he was ready for a nervous breakdown or suicide, and initially agreed to a voluntary admission to the Veterans Administration psychiatric facility at Palo Alto, California. Raymond J. Schwarz waited in and around Dr. Raffin's office while arrangements for the hospitalization and transportation were completed. After this 2-3 hour wait, Raymond J. Schwarz had calmed down; he changed his mind and refused hospitalization. Dr. Raffin immediately sent the patient to see Dr. Johnston.

10. Dr. Johnston met with Raymond J. Schwarz promptly on referral from Dr. Raffin on February 7, 1972, and urged the patient to continue psychiatric therapy, but he declined. Dr. Johnston's assessment of Raymond J. Schwarz during this session was that he was more relaxed than in November, and not acutely suicidal, but that the long-term prospect in this respect was guarded.

11. Late in the evening of April 11, 1972, Raymond J. Schwarz came to his mother's apartment in San Francisco in a highly agitated state. He talked about suicide for several hours with his mother, at which point she took him to Fort Miley. He sought admission but was advised that there was no in-patient psychiatric facility at Fort Miley, and that he should contact the Palo Alto facility in the morning to arrange for admission. He was given a sedative by the doctor, who noted in his report that there was no acute suicide problem.

12. On April 12, 1972, Raymond J. Schwarz met with Dr. Johnston and stated that he felt his mind was racing. Dr. Johnston felt the symptoms displayed at that time indicated incipient psychosis and prescribed a low dose of Stelazine for the first time. Dr. Johnston declined at that time to discuss Mr. Schwarz' case with the patient's mother, according to the plaintiff's testimony.

13. Raymond J. Schwarz kept his next appointment with Dr. Johnston on April 17, 1972, at which time he reported his mind had slowed down and he felt better. Dr. Johnston noted that for the first time Mr. Schwarz showed some receptiveness to psychiatric treatment. Dur-

ing this week, Raymond J. Schwarz was staying with his mother who observed that he appeared to be getting along all right after the earlier crisis.

14. On April 20, 1972, Raymond J. Schwarz dropped by the Fort Miley Mental Health Clinic without appointment and asked a psychiatrist he had not seen before for additional Stelazine. He was told instead to return to see his regular psychiatrist, Dr. Johnston, on the next day. This was his last VA contact.

15. On April 21, 1972, the plaintiff called Raymond J. Schwarz on the telephone, and had what she considered to be a normal conversation with him, with no indication of any impending suicide or suicidal plans.

16. On April 24, 1972, Raymond J. Schwarz committed suicide in his apartment in Berkeley, California.

CONCLUSIONS OF LAW

1. Plaintiff has brought this wrongful death action under the provisions of the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671, et seq. Section 1346(b) establishes the exclusive jurisdiction of this Court over both the parties and the subject matter of this action, and it also specifies that tort liability of the United States must be based upon the law of the place where the act or omission occurred.[1] Thus, the law of the State of California

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[1]Section 1346(b) provides: Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property,

controls here, particularly as to the existence of any cause of action. *United States v. English,* 521 F.2d 63 (9th Cir. 1975).

2. The first issue we must consider is whether defendant's physicians had a duty to warn plaintiff that the decedent might commit suicide. At common law, the general rule was that one person owed no duty to control the conduct of another (Rest. 2d Torts (1965), Sec. 315). Further, one had no duty to warn those endangered by such conduct (Rest. 2d Torts, *supra,* Sec. 314, com. c.; Prosser, Law of Torts (4th ed. 1971) Sec. 56, p. 341). Plaintiff, however, relies on the decision in *Tarasoff v. The Regents of the University of California,* 17 Cal. 3d 425, 435, 131 Cal. Rptr. 14, 23 (1976), to establish an exception to this general rule. It is plaintiff's contention that *Tarasoff* establishes a duty to warn in the instant case.

In *Tarasoff,* the California Supreme Court determined that the defendant had a special relationship with the perpetration of the conduct in question, and the defendant's psychiatrists thus were liable for their failure to warn the victim. However, the psychiatrists in *Tarasoff* had determined that the patient was dangerous, and that the patient had specifically identified Miss Tarasoff as his intended murder victim. Thus, the court in *Tarasoff* went no further than establishing a limited exception to the common law rule: a duty to warn exists when a therapist

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or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

knows his patient is likely to injure *another* and where the identity of the victim is known or is readily discoverable by the therapist. (See *Bellah v. Greenson,* 141 Cal. Rptr. 92, 94 (1977)).

The facts in *Tarasoff* are readily distinguishable from those before us in the instant case. Here there is no evidence of any specifically articulated intention of decedent to kill himself or anyone else. All that is shown is evidence of transient suicidal ideation posing a long-term risk. Furthermore, the *Tarasoff* case involved the intention to kill another, and the case before us involves self-destruction.

The question of extending the *Tarasoff* decision to cover suicide cases as well has indeed been addressed by the California appellate courts, but only once. The case was *Bellah v. Greenson, supra,* and the First District Court of Appeal refused to impose liability on a psychotherapist for failure to warn a patient's parents that the patient, a child, might commit suicide. In a closely-reasoned decision, the court weighed the requirements of confidentiality regarding a patient's statements against the danger of self-inflicted harm. Its conclusion was that a therapist is required to disclose a confidential communication only when the risk is one of violent assault, and such assault is sought to be prevented by disclosure to the intended victim.

The reasoning of the court in *Bellah* is most persuasive. We deem it unwise to impose an absolute duty on a psychiatrist to disclose a patient's confidential statements regarding suicidal intentions. To do so would be to lay an

enormous burden upon psychiatrists, a burden that would be the genesis of profound conflict. The psychiatrist would face the difficult task of reconciling his particular obligation to keep his patient's shared thoughts in strict confidence with a legal duty to disclose. Thus, any court must be particularly cautious in imposing such a duty, and it must do so only when circumstances clearly compel such imposition.

The facts in the case at bar do not so compel us. Plaintiff's psychiatric expert testified that she would have considered it good practice, or even obligatory, to give plaintiff some warning, but she recognized that there was respected psychiatric opinion in the community to the contrary (which nevertheless falls within the standard of care.)[2] Accordingly, the evidence is not sufficient to warrant this Court's imposing a burden upon the psychiatrists in the instant case to disclose decedent's statements regarding suicide.

Thus, the facts before us do not fall within the exception articulated in the *Tarasoff* decision, nor do we believe that the evidence is sufficient to warrant extending the *Tarasoff* principle beyond its peculiar facts. The *Tarasoff* decision generated considerable discussion and no small amount of controversy within the psychiatric community, and this Court is well aware of both the need for caution in approaching any extension and the potentially profound effects of such extension.

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[2]Prosser, *Law of Torts* 163 4th ed. 1971.

There is an additional consideration that bears on this issue. A VA psychiatrist has a special obligation to maintain a confidential relationship with his patient. Medical information is privileged and its disclosure very carefully limited by statute.[3] The regulations issued pursuant to this statute make it very clear that disclosure in the instant case would have been wholly inappropriate.[4] There was no

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[3]38 United States Code 3301 provides in pertinent part that:

(a) All files, records, reports, and other papers and documents pertaining to any claim under any of the laws administered by the Veterans Administration and the names and addresses of present or former personnel of the armed services, and their dependents, in the possession of the Veterans Administration shall be confidential and privileged, and no disclosure thereof shall be made except as provided in this section.

(b) The Administrator shall make disclosure of such files, records, reports, and other papers and documents as are described in subsection (a) of this section as follows:

(1) To a claimant or duly authorized agent or representative of a claimant as to matters concerning the claimant alone when, in the judgment of the Administrator, such disclosure would not be injurious to the physical or mental health of the claimant and to an independent medical expert or experts for an advisory opinion pursuant to section 4009 of this title.

[4]Veterans Administration Regulation 513 (38 Code of Federal Regulations, 1.513) provides in pertinent part:

(b) *Medical Records.* Information contained in the medical records (including clinical records and social data) may be released under the following conditions:

(1) Complete transcript of or resume of medical records on request to:

(ix) The veteran on request, except information contained in the medical record which would prove injurious to his or her physical or mental health.

(x) The next of kin on request of the individual, or legal representative, when the information may not be dis-

evidence of authorization by decedent for release of information to his mother.

In summary, the legal duty to warn created by the *Tarasoff* decision is not applicable to this case as a matter of law, nor will his Court extend such a duty, in the event of self-inflicted harm, to overcome the statutory requirements of confidentiality.[5]

We next consider the issue of whether defendant's physicians failed to exercise due care in protecting decedent from his own suicidal tendencies. To resolve this issue, we must consider its three subsidiary considerations: first, the course of treatment; second, the failure to admit decedent voluntarily; and third, the failure to seek an involuntary commitment.

With regard to the course of treatment, there is no evidence from which this Court can conclude that the care provided decedent by the Veterans Administration physicians was beneath the appropriate standard of care. That standard holds a physician to the degree of learning and skill ordinarily possessed by practitioners of the medical

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closed to the veteran because it will prove injurious to his or her physical or mental health, and it will not be injurious to the physical or mental health of the next of kin or cause repugnance or resentment toward the veteran; and directly to the next of kin or legal representative, when the veteran has been declared to be insane or is dead.

[5]Having found no duty to warn, we need not discuss at length plaintiff's other elements of her first cause of action. We note, however, that the evidence establishes that plaintiff had *actual knowledge* that decedent was contemplating suicide and that plaintiff had such knowledge some twelve days prior to decedent's suicide. Thus, there is no adequate showing of proximate cause, and plaintiff's contentions on that subject must fail.

profession in the same or similar locality and to the exercise of due care in applying such learning and skill to the treatment of his patient. *Lawless v. Calaway,* 24 Cal. 2d 81, 147 Pac. 2d 604 (1944), *Simone v. Sabo,* 37 Cal. 2d 253, 231 Pac. 2d 19 (1951).

The evidence clearly supports a conclusion that the Veterans Administration's physicians did not fall below this standard. They were prompt, responsible, thorough, and professional. They prescribed medicines that were in common use, and both the dosages and frequencies were proper. What's more, the evidence, including the testimony of plaintiff's expert, supports a finding that none of the medicines created the risk of suicide, nor did they pose any other danger to decedent.

The second sub-issue is the matter of voluntary admission, and it may be viewed from two perspectives. The first involves the lack of in-patient psychiatric facilities at the Fort Miley hospital, which led the physician on emergency duty on April 12, 1972, to decide not to admit the decedent. The policy decision by the Veterans Administration not to include an in-patient psychiatric facility at Fort Miley is clearly covered by the provision of 28 U.S.C. 2680, the discretionary function exclusion of the Federal Tort Claims Act. The record is also clear that there was no indication of an emergency, and the patient's course over the ensuing week confirms the doctor's assessment of absence of acute suicidal potential on the morning of April 12, 1972.

The second perspective is the matter of whether the decision not to admit decedent may be regarded as the proximate cause of plaintiff's loss. The facts argue convincingly

that it may not. Decedent's condition stabilized; in fact, it improved in the days following April 12, 1972, even though decedent was not hospitalized. His suicide came twelve days later. Thus, it seems that proximate causation has not been proved by a preponderance of the evidence. This is an additional and independent ground for finding that there is no liability attaching to the Veterans Administration for the decision not to admit.

The final sub-issue is the question of the decision not to involuntarily commit the decedent. The Court believes that all the reasons for not imposing liability for the decision not to admit the decedent, as discussed above, apply with even greater force to the question of involuntary commitment. The only time that decedent exhibited symptoms of acute suicidal tendencies was on February 7, 1972; those symptoms subsided rapidly while decedent was waiting, to the point that within a few hours decedent no longer even wished to be hospitalized. The care and attention he received that day at the hands of Dr. Johnston was thorough, conscientious, and professional. At its conclusion, Dr. Johnston concluded that decedent was not acutely suicidal, a conclusion that was certainly reasonable under those circumstances.

As to the testimony of plaintiff's expert, Dr. Terr, regarding her opinion that the record warranted involuntary commitment, there is in that testimony an important concomitant view that bears discussion. Dr. Terr acknowledged that, among other things, a reasonable psychiatrist might reach a different conclusion, given the constraints against involuntary commitment imposed in California by the Lan-

terman-Petris-Short (LPS) Act, which is codified at Sections 5000 *et. seq.* of the California Welfare and Institutions Code. Thus, we find ourselves in the position of recognizing that, just as in the case of the warning discussed above, there is a respected minority of psychiatrists in the community which would reach a conclusion contrary to Dr. Terr's, i.e. a decision not to involuntarily commit. This testimony by Dr. Terr is bolstered by that of defendant's expert, Dr. Motto, that conditions in this case did not warrant involuntary commitment. Therefore, the Court is compelled to find that plaintiff has again failed to establish by a preponderance of the evidence that the decision constituted actionable negligence.

Another, and independent, ground for finding no liability in the decision not to involuntarily commit the decedent is that the decision falls within the discretionary function exception of 28 United States Code 2680(a).[6] The case of *Fahey v. United States,* 153 Fed. Supp. 878 (S.D. N.Y. 1957) is directly on point: it concerned Veterans Administration psychiatrists who were being sought to be held liable for a decision not to involuntarily commit. The court held in *Fahey* that such a decision is a discretionary func-

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[6]Section 2680 provides: The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

tion under 28 U.S.C. 2680 (a).[7] This Court agrees with that holding and applies it to the present case, barring liability.

A final reason for finding no liability is the absolute immunity for public employees of designated facilities based upon a determination not to commit. *Hernandez v. State of California,* 11 Cal. App. 3d 895, 90 Cal. Rptr. 205 (1970). This statutory immunity is contained in California Government Code § 856.[8] In sum, then, the decision not to commit decedent is not actionable.

Finally, there is again the question of whether plaintiff has sustained her burden of proof in proximate cause, this time with regard to the decision not to involuntarily com-

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[7]The Court in *Fahey* stated: "In this case the acts of the psychiatrists involved come within the scope of the term 'discretionary function.' They were retained to make professional diagnoses and if any error was committed it was an error in the exercise of their authorized discretion resulting from an improper diagnosis. Such conduct is clearly within the scope of the exception and clearly not actionable. Numerous cases have so held when considering the liability of hospitals where injuries have resulted from the exercise of medical judgment in the case of mental patients."

[8]Section 856 provides:

> (a) Neither a public entity nor a public employee acting within the scope of his employment is liable for an injury resulting from determining in accordance with any applicable enactment:
>
> (1) Whether to confine a person for mental illness or addiction.
>
> (2) The terms and conditions of confinement for mental illness or addiction.
>
> (3) Whether to parole, grant a leave of absence to, or release a person confined for mental illness or addiction.
>
> (b) A public employee is not liable for carrying out with due care a determination described in subdivision (a).

mit. As was the case with the issue of voluntary admission, the facts argue convincingly that the decision was not the proximate cause of decedent's suicide. The entire matter of involuntary commitment occurred February 7, 1972. Decedent's suicide occurred more than two months later, and there is no chain of causation stretching over those two-plus months. Thus, we have a separate and independent ground for finding no liability for this act.

For all of these reasons, the Court has concluded that defendant, United States of America, is entitled to judgment against plaintiff and that defendant's motion for dismissal under F.R.C.P. 41 (b) should be granted.

Let judgment be entered accordingly.

Dated: January 24, 1978.

/s/ William W. Schwarzer
United States District Judge

(c) Nothing in this section exonerates a public employee from liability for injury proximately caused by his negligent or wrongful act or omission in carrying out or failing to carry out:

(1) A determination to confine or not to confine a person for mental illness or addiction.

(2) The terms of conditions of confinement of a person for mental illness or addiction.

(3) A determination to parole, grant a leave of absence to, or release a person confined for mental illness or addiction.

Appendix D

In the United States District Court
For the Northern District of California

Civil No. C-75-0637-WWS

Alvina E. Schwarz,
Plaintiff,

vs.

United States of America,
Defendant.

JUDGMENT

[January 24, 1978]

The above entitled case having come on for trial, and the Court in the first half of the trial, bifurcated into liability and damages, having heard the evidence and the arguments of the parties as to liability issues, and having this day entered its Findings of Fact and Conclusions of Law, and having found the issues in favor of the defendant, the United States of America, and against the plaintiff, Alvina E. Schwarz, Now, Therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment shall be, and the same hereby is, entered in favor of the defendant United States of America and against plaintiff Alvina E. Schwarz, and that plaintiff takes nothing by her complaint, and that defendant's motion for dismissal under FRCP 41(b), on the

ground that upon the facts and the law the plaintiff has shown no right to relief, is granted, and the action is hereby dismissed.

Dated: January 24, 1978

/s/ William W. Schwarzer
United States District Judge

Appendix E

In the United States District Court
Northern District of California

Before: The Honorable William W. Schwarzer, Judge

No. C-75-D137 WWS

Alvina E. Schwarz,
Plaintiff,

vs.

United States of America,
Defendant.

REPORTER'S TRANSCRIPT

Wednesday, November 16, 1977

* * * The Court: Well, I think that I have studied this matter sufficiently, and having heard the arguments and reviewed the cases and the testimony, I am prepared to making a ruling on the Rule 41 Motion made by the defendant, and I will read to you my findings of fact and conclusions of law in this matter. I will ask that counsel for defendant, based on the transcript of these statements that I make, prepare appropriate findings and conclusions, unless plaintiff, after considering the matter, determines to waive them.

This is a wrongful death action brought under the Federal Tort Claims Act by the mother of the decedent. The court has jurisdiction of the action.

Decedent died as a result of committing suicide on April 24, 1972, at which time he was 23 years old. He had previously served in the Navy, until approximately June, 1971, when he received a medical discharge. At the time it was determined that he suffered from a psychophysiological musculoskeletal condition, and shortly thereafter he was accorded a 50 percent disability rating.

The decedent had previously been hospitalized in several naval hospitals in Puerto Rico and at Oak Knoll, in Oakland, before his discharge.

In the summer or early fall of 1971, he came to the San Francisco Veterans Hospital at Fort Miley for the first time complaining of rectal bleeding. He received diagnosis and care, and during this period he saw several doctors at the hospital with a series of complaints concerning back and abdominal pains and other possible gastrointestinal problems. He was given codeine and advised to seek psychotherapy, which at the time he declined.

In November, 1971, he saw Dr. Raffin at Fort Miley for the first time. Dr. Raffin was an internist and a gastroenterologist. After making a number of tests and diagnoses, Dr. Raffin concluded that he could find no physiological cause for the decedent's continuing symptoms and difficulties. He spent some time talking with the decedent and found that he suffered from depression, and also as a result of a routine inquiry discovered that he had given thought to possibly committing suicide. As a result of these findings, Dr. Raffin referred the decedent to the Mental Health Clinic, Fort Miley, where he went and promptly saw Dr. Johnston.

Dr. Johnston, after visiting and diagnosing the decedent, concluded that he was not psychotic, but recommended a psychiatric workup. Dr. Johnston saw the decedent again on November 11th. At that time he formed the impression of a schizoid personality suffering from depression. After this visit, the decedent did not return to see Dr. Johnston.

In December, the decedent saw Dr. Raffin, who prescribed phenobarbital and belladonna, which decedent took in amounts in excess of what was prescribed, but not in quantities which gave rise to any particular concern. At that time, Dr. Raffin noted that the decedent was not suicidal when he saw him in December.

On February 7, 1972, the decedent came into the hospital to see Dr. Raffin, after taking an overdose of aspirin, telling Dr. Raffin that he was ready for a breakdown or suicide. He spent some time in and around Dr. Raffin's office, two or three hours, during which period Dr. Raffin found that he calmed down. When he had first come in that day, Dr. Raffin had concluded that he should pursue the matter of hospitalization at the Palo Alto facility, where the Veterans Administration maintains facilities for psychiatric hospitalization, and at that time the decedent was agreeable to being hospitalized. However, after some two or three hours had passed, the decedent had, according to Dr. Raffin, calmed down sufficiently, and at that point the decedent declined to go to the hospital. Dr. Raffin referred him to Dr. Johnston, who consulted with him and urged him to continue with psychiatric care. As a result of this visit, Dr. Johnston concluded that the decedent was more relaxed than he had been in November, and further

concluded that he did not consider him acutely suicidal, but that the long-term prospect in this respect was guarded.

On April 11, 1972, the decendent came to visit the plaintiff at his mother's apartment in a highly agitated state. He talked about suicide and discussed with his mother for some time the matter of suicide. After several hours of talk between him and his mother, his mother took him to Fort Miley for emergency treatment. The decedent at that time requested admission, but was advised by the doctor on duty at the emergency ward that there was no facility for him available there, but that he should contact the Palo Alto facility on the next day to obtain admission. The doctor noted in his report that there was no apparent suicide problem.

The next day an appointment was made to see Dr. Johnston, and the decedent went to see Dr. Johnston. His mother took him to that appointment. The decedent told Dr. Johnston that his mind was racy. Dr. Johnston felt that the symptoms displayed at that time indicated incipient psychosis, and he prescribed stelazine. According to the plaintiff's testimony, Dr. Johnston at that time declined to discuss the case with her, saying something to the effect that he and the decedent had taken care of the problem.

The decedent kept his next appointment with Dr. Johnston on April 17, 1972, at which time his mind had slowed down and he felt better. And Dr. Johnston felt that for the first time the decedent indicated some receptiveness to psychiatric treatment. During this week, the decedent

was staying with his mother, who observed that he appeared to be getting along all right after the earlier crisis.

On April 9, the decedent moved back to his apartment. On April 20, he dropped by the mental health clinic unannounced and asked for something to help him feel better. He did not see either Dr. Johnston or Dr. Raffin. He was told to see Dr. Johnston the next day or so.

On April 21, the plaintiff talked to the decedent on the telephone, having called him, and had what she considered to be a normal conversation with him, with no indication of any impending suicide or plans for suicide.

On April 24, the decedent committed suicide in his apartment in Berkeley.

The first issue is whether the defendant's doctors were under a duty to warn the plaintiff that the decedent might commit suicide. In this respect, plaintiff relies on Terrasaw versus the Regents [sic]. The court does not consider that that case is applicable here, because in the Terrasaw [sic] case, the patient had stated specifically that he intended to kill a named victim. There is no evidence here of a specifically articulated intention of decedent to kill himself. All that is shown is evidence of a suicidal tendency posing a long-range danger.

Now, the question whether there is a duty to warn is a question of law that the court has to determine on the facts. Plaintiff's expert testified that under these circumstances she would have considered it good practice or perhaps obligatory to give a warning, but she recognized that

there was a respectable psyciatric [sic] opinion in the community which might reach a different conclusion. Under those circumstances, the evidence is not sufficient to warrant extending the Terrasaw [sic] principle beyond its peculiar facts. Moreover, it seems to the court that to impose a legal duty on psychiatrists to disclose what is confidential information in these kinds of circumstances would impose an enormous burden, enormous conflict on the psychiatrist, who is under a particular obligation to maintain confidentiality and would have a particular problem coming to terms with such a legal duty, so that the court should be particularly cautious in imposing that kind of a duty on a psychiatrist. The decision whether to give warning, in view of all the complex considerations that enter into such a decision, such as considerations of confidentiality, and the possible impact of the breach of that relationship on the ability to continue psychiatric training with that patient, seem to the court to require treating that as a discretionary function under 28 U.S.C. 2680(A) [sic].

Now, finally, with respect to the duty to warn, it doesn't seem to the court that there's an adequate showing here of proximate cause, inasmuch as the plaintiff herself had been told by the decedent on April 11 to 12, some twelve days before the suicide, of his thoughts about suicide, had discussed the subject with him for some time, and therefore was on notice and in a position to take whatever steps she felt appropriate to protect him.

The second issue is whether defendant's doctors failed to exercise due care in protecting the decedent against his own suicidal tendencies, and that issue breaks down into three subsidiary issues: First, the course of treatment; second,

the failure to commit the decedent voluntarily, or seek a voluntary commitment; and third, the failure to seek an involuntary commitment.

Now, with respect to the course of treatment, there is no evidence from which the court could find that the care given to the decedent by the doctors at the Veterans Hospital was not within the standard of care which controls. From all that appears, the defendant's doctors acted promptly, responsible and [sic] in a thorough and professional manner. The medicines prescribed were in common use, the dosages and frequencies prescribed were not shown to be improper, and so far as the evidence shows, none created the risk of suicide or other damage to the decedent.

The treatment decisions themselves appear to be well within the exception for discretionary functions under 28 U.S.C. 2680(A) [sic].

Now, with respect to the failure to commit, that breaks down into two categories: first, the failure to commit on April 12, 1972, at which time decedent, accompanied by the plaintiff, appeared at the hospital and requested commitment. The decision by the doctor who was then on emergency duty not to admit the decedent appears to have been based first on the lack of psychiatric inpatient facilities at Fort Miley and the absence of any indication of an emergency. It cannot be said that that decision, under those circumstances, does not fall within the discretionary function exception previously referred to, and the case of Fahey against United States, 153 Fed. Sup. 878, appears to the court to be directly on point. So liability in that case would be barred first by the discretionary function exception

under 28 U.S.C. 2680(A) [sic]. In addition, California law controls, and under Government Code Section 956, there is an absolute immunity for public employees against liability based on a determination not to commit. And I refer to Hernandez versus State, 90 Cal Reporter, 205. So that is a separate and independent ground why the failure to commit or to receive on April 12 was not actionable.

Finally, there is a serious question whether the failure to commit the decedent on April 12 could be regarded as a proximate cause of the plaintiff's loss, inasmuch as the decedent's condition stabilized and, from all appearances, improved following April 12, without hospitalization, and his suicide did not occur until twelve days later. So it seems to the court that the element of proximate cause has not been proved by a preponderance of the evidence. That is an additional independent ground for finding that there is no liability for that particular act.

Finally, I come to the question of whether liability can be imposed based on the failure to commit the decedent involuntarily. It seems to the court that all of the reasons for not imposing liability for not hospitalizing or committing the decedent on April 12, when he appeared, with a request to be hospitalized, apply with even greater force with respect to the defendant's failure to commit the decedent involuntarily. Only on February 7, 1972 did the decedent show symptoms of acute suicidal tendencies. Now, those symptoms subsided rapidly while the decedent was at the hospital, so that by the end of that period of time, on that day, the decedent no longer wished to be hospitalized. The decedent received thorough and conscientious profes-

sional attention on that day, and at the conclusion of it, Dr. Johnston concluded that he was not acutely suicidal.

The plaintiff's expert testified that in her opinion the record warranted seeking involuntary commitment. However, she acknowledged that, among other things, in view of the constraints against involuntary commitment imposed on the medical profession in California by the L-P-S Act, a reasonable psychiatrist might reach a different conclusion; that is, just as in the case of the warning, a respected minority of psychiatrists in the community might reach the decision contrary to her view and a decision not to commit involuntarily.

In addition, there is testimony from the defendant's expert that the conditions in this case did not warrant involuntary commitment.

In these circumstances, the court is compelled to conclude that the plaintiff has failed to establish by a preponderance of the evidence that the failure to commit involuntarily constituted actionable negligence. Of course, as previously indicated, there is a separate independent ground for finding that no liability exists for the failure to commit involuntarily, both under Government Code Section 856 and 29 U.S.C. Section 2680(A) [sic].

Finally, and again, there is a question whether the plaintiff met the burden of proof that the failure to commit involuntarily on the occasion on which it might have been appropriate, namely, February 7, was a proximate cause of the loss for which recovery is sought here for suicide on April 24, more than two months later.

And for all of these reasons, the court has concluded that the defendant's motion should be granted and that judgment should be entered in favor of defendant.

I will ask the defendant to prepare appropriate findings and conclusions, unless they are waived by the plaintiff.

Mr. Nagan: If they are so waived, your honor, perhaps your memorandum could state that these are the findings of the court.

The Court: Well, I will state that these shall constitute the findings of fact and conclusions of law, but I think it will be necessary for them to be prepared in writing, unless they're waived. Now, is there anything further to come before the court?

Mr. Knudsen: No, your honor.

Mr. Nagan: Your honor, I would like to make one request that you consider publication of the case for guidance in cases like this. We haven't gotton a great deal of law on the subject, and I know for the Veterans Administration psychiatrists I can speak for, it would be helpful to have this as a published guideline.

The Court: Well, the problem with publication is very frankly that if you're going to publish, you have to get involved in—in a lot of clerical and other kinds of work. It is sometimes difficult to get to, but I will consider the matter.

Mr. Nagan: Perhaps findings of fact, conclusions of law.

The Court: Well, I don't like to have matters published in the form in which I might read them. I think that even

though a—a decision is carefully considered and arrived at, when it comes to publishing in a book, you get involved in a lot of other considerations, but I will consider the matter and I will be glad to have you prepare these findings and conclusions in a more polished form and submit it, and then I'll consider whether I want to have that published. The more polished form I get from you, the less effort it will be for me and my staff to get something in shape for publication.

Mr. Nagan: Very good.

Mr. Boone: Thank you, your honor.

(Whereupon, the proceedings were concluded.)

CERTIFICATE OF REPORTER

I (We), the undersigned Official Reporter(s) and Official Reporter(s) pro tem of the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California, do hereby certify:

That the foregoing transcript, Pages No. [A-22] through [A-34], inclusive, constitute a true, full and correct transcript of my (our) shorthand notes taken as such Official Reporter(s) and Official Reporter(s) pro tem of the proceedings hereinbefore entitled, and reduced to typewriting to the best of my (our) ability.

(Signed) RAYMOND LINKERMAN
Raymond Linkerman

(Signed)
Carl R. Pline

Appendix F

28 U.S.C. § 1346(b)

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2680(a)

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

38 U.S.C. § 3301(a),(b)

(a) All files, records, reports, and other papers and documents pertaining to any claim under any of the laws administered by the Veterans' Administration and the

names and addresses of present or former personnel of the armed services, and their dependents, in the possession of the Veterans' Administration shall be confidential and privileged, and no disclosure thereof shall be made except as provided in this section.

(b) The Administrator shall make disclosure of such files, records, reports, and other papers and documents as are described in subsection (a) of this section as follows:

(1) To a claimant or duly authorized agent or representative of a claimant as to matters concerning the claimant alone when, in the judgment of the Administrator, such disclosure would not be injurious to the physical or mental health of the claimant and to an independent medical expert or experts for an advisory opinion pursuant to section 4009 of this title.

(2) When required by process of a United States court to be produced in any suit or proceeding therein pending.

(3) When required by any department or other agency of the United States Government.

(4) In all proceedings in the nature of an inquest into the mental competency of a claimant.

(5) In any suit or other judicial proceeding when in the judgment of the Administrator such disclosure is deemed necessary and proper.